VIRGINIA LAW REGISTER.

EDITED BY W. M. LILE.

Issued Monthly at $5 per Annum. Single Numbers, 50 Cents.

Communications with reference to CONTENTS should be addressed to the EDITOR at University Station, Charlottesville, Va.; BUSINESS communications to the PUBLISHERS.

MISCELLANEOUS NOTES.

WE are advised by Messrs. Hurst & Company, publishers of the Annotated Digest of the Virginia Reports, that volume 2 will be ready for delivery about April 15. In common with the bench and bar of the State, we contemplate the final completion of this much needed work with intense satisfaction.

AMERICAN BAR ASSOCIATION—ADMISSION TO THE BAR.—At the meeting of the American Bar Associatian on August 25, 1897, the following resolutions were adopted:

"*Resolved*, That the American Bar Association approves the lengthening of the course of instruction in law schools to a period of three years, and that it expresses the hope that as soon as practicable, a rule may be adopted in each State which will require candidates for admission to the bar to study law for three years before applying for admission.

"*Resolved*, That the American Bar Association is of the opinion that before a student commences the study of law, it is desirable that he should have received a general education, approximately at least, equivalent to a high school course, and that persons who have not completed the equivalent of such a course should not be admitted into law schools as candidates for a degree.

"The association means by the expression, 'A high school course,' a course of study beginning at the end of a grammar school course and extending over four full years."

"The course of study referred to would include a knowledge of English grammar, English composition, English and American literature, the History of England and the United States, as well as general history, arithmetic, algebra, plane and solid geometry, physical geography, civil government, elementary physics, human physiology, botany, and either zoology, geology, chemistry or astronomy, as the applicant selects. The candidate might be permitted to substitute a foreign language for an equivalent amount of science study."

THE right of the trustee of land to pay over the purchase price thereof to the beneficial owner without searching the records for liens against the latter is sustained, in *Bartz* v. *Paff* (Wis.), 37 L. R. A. 848, and he is held not to incur the risk of being compelled to account a second time to creditors of such owner.

COVENANT AND ASSUMPSIT MADE INTERCHANGEABLE.—Attention is called to a recent act of the Virginia legislature, published elsewhere in this number, providing that "in any case in which an action of covenant will lie, there may be maintained an action of assumpsit."

This is a step in the right direction, and, we hope, an entering wedge toward the abolition of the absurd and antiquated distinction between sealed and unsealed instruments. Many of our sister States have long since relegated the distinction to ancient history, where it belongs; and our own Court of Appeals in the recent case of *Bradley Salt Co.* v. *Norfolk etc. Co.*, 3 Va. Law Reg. 722, 727, indicates, in plain language, its approval of such legislation.

It will be observed that the statute does not in terms abolish the distinction between covenant and assumpsit; it does not, for example, in terms, permit an action of covenant wherever assumpsit will lie—but, only, assumpsit wherever covenant lies. Since, however, section 2901 of the Code, providing that "in any case in which trespass will lie, there may be maintained an action of trespass on the case" is held to abolish all distinction between trespass and case, and to permit a writ in trespass to be followed by a declaration in case (*New York etc. Railroad Co.* v. *Kellam*, 83 Va. 851), the same construction placed on the new statute would obliterate the distinction between assumpsit and covenant, and render them interchangeable.

But this statute is scarcely broad enough to reach the difficulty which confronts the pleader in dealing with the question of seal or no seal. He may indifferently bring covenant or assumpsit; but doubtless if the plaintiff's action is based on a sealed instrument, the rules of pleading would require an allegation to that effect. The rights of both plaintiff and defendant are materially different when arising from sealed and unsealed instruments, respectively; and it would seem that the defendant is entitled to be informed by the declaration whether he is to prepare to defend an action on a sealed or an unsealed instrument. For example, there is important difference in the periods of limitation applicable to the specialty and to the simple contract. Under existing rules of pleading, in an action on a simple contract, the defendant may, under the general issue, show fraud in the consideration, absence of all consideration, failure of consideration in whole or in part, etc. (*Columbia etc. Association* v. *Rockey*, 93 Va. 678), while if the action is on a specialty, he can only make these defenses by a special plea in the nature of a plea of set-off. If assumpsit be brought on a specialty, what defenses may now be made under the general issue? May the defendant prove *non est factum?* May he, under the general issue, set up any of the defenses heretofore available only by special plea in the nature of a plea of set-off?

With such important differences in the rights of the parties, depending upon the character of the instrument sued upon, it would seem, as stated, that the defendant is entitled to know, in advance of the trial, upon what sort of instrument the action is based. And hence, that the plaintiff will still be confronted with the very difficulty which the statute was probably intended to remove—that is, he must decide, in advance, whether to declare on a specialty or on a simple contract.

These questions should have been provided for in the statute. But as they are left to be worked out by the courts, we hope the statute will be liberally interpreted, and in a way to suppress the mischief at which it is aimed. A liberal interpretation would allow, under the plea of *non-assumpsit* to an action on a

specialty, any defense permissible under such plea in action on a simple contract. It may be difficult, however, to so construe the statute as to relieve the plaintiff from alleging the character of the instrument sued on, so that the defendant may prepare his plea of the statute of limitations, if he should be so advised.

LIFE INSURANCE—SUICIDE.—We publish elsewhere in this number, the opinion of the Supreme Court of the United States, in *Ritter* v. *Mutual Life Insurance Company.*

The decision has attracted much attention from the press of the country, both lay and professional. The proposition lending most interest to the very excellent opinion of Mr. Justice Harlan, is that dealt with in the latter part of the opinion, viz: that a contract by the insurer to pay the amount of the policy, though the assured take his own life, when in the full possession of his faculties, is invalid, as contrary to public policy.

The announcement of this rule of law was scarcely necessary to the decision of the case before the court, and yet it embodies a principle of such apparent soundness that it will doubtless withstand any assault that may hereafter be made upon it.

The rule, as stated, is not confined to the case where the assured actually *takes* his own life. If the contract *permits* him to do so, while his powers are in no wise impaired by insanity, self-destruction is thereby encouraged—the contract as soon as made is tainted with illegality—and, it would seem, though the assured continued to pay premiums and afterwards died a natural death, no recovery could be had on the policy—the risk never having attached, and the contract being void from its inception.

Curiously enough, the same question, as to the effect of suicide by the assured when sane, was presented in another Pennsylvania case decided about the same time, in the Supreme Court of that State—*Morris* v. *State Mutual Life Assurance Co.*, 39 Atl. 52 (Jan. 3, 1898)—the only difference being that in the latter case the policy was payable, not to the assured, but to his wife. The application contained a clause against suicide, but, as in the *Ritter Case*, it was excluded under the Pennsylvania statute, so that the policy, as construed, contained no stipulation as to suicide. The trial court excluded evidence offered by the defense that the assured took his life while sane. On appeal, the company relied upon the decision of the Circuit Court of Appeals in the *Ritter Case*, but the court held the ruling of the trial court proper, and distinguished the case from the other, by reason of the fact that the policy was payable to the wife and not to the personal representative of the assured.

"It is maintained, however," says the court, "that, even if the application be excluded, nevertheless suicide avoided the policy, and there could be no recovery; therefore the court erred in not admitting evidence as to the cause of death. *Runk's Ex'rs* v. *Insurance Co.*, 28 U. S. App. 612, 70 Fed. 954, and 17 C. C. A. 537, is cited as sustaining this contention. It is there decided that it is a fundamental condition of the contract, although the policy is silent on the subject, that the insured, while sane, will not voluntarily destroy his life. That, however, is not this case. We are not called upon to decide what would have been the effect on the contract if the policy itself had been payable to the insured, or to his personal representatives. This was payable to his wife, who had an interest in his

life; and she in fact paid the first premium, by lifting the note given by him for it. In *Gibbons* v. *Gibbons*, 175 Pa. St. 475, 34 Atl. 846, and *Matlack* v. *Insurance Co.*, 180 Pa. St. 360, 36 Atl. 1082, we have decided that the insured cannot defeat the gift to his wife by a fraud upon her, or by collusively forfeiting it for non-payment of premium, and then having a new one issued to another beneficiary. The point before us has not been directly decided in this State, but has been in other States. In *Fitch* v. *Insurance Co.*, 59 N. Y. 557, the court says: 'The policy contained no stipulation that it should be void in case of the death of the insured by suicide. It was not taken out for the benefit of Fitch [the insured], but of his wife and children. Although they were bound by his representations, and any fraud he may have committed in taking out the policy, the policy having been obtained through his agency, yet they were not bound by any acts or declarations done or made by him after the issue of the policy, unless such acts were in violation of some condition of the policy.'"

FOREIGN RECEIVERS — REMOVAL OF ASSETS.—In *Grogan* v. *Egbert*, 28 S. E. 714, the Court of Appeals of West Virginia holds that a foreign receiver of a dissolved foreign partnership, will be recognized as such in the courts of that State, but that the receiver will not be permitted to remove assets of the partnership from the State, until the claims of domestic creditors are satisfied. The particular domestic claim asserted as against the receiver was a separate debt against one of the partners. While recognizing the principle that a partnership debt cannot ordinarily be garnished at the suit of a separate creditor, the court held that, under the circumstances of the case, and to prevent fraudulent collusion, the burden of proof was upon the receiver to show that the fund in question was necessary for the payment of partnership debts or for the satisfaction of the other partners' claims; and in the absence of such proof, the separate creditor was permitted to subject it to his debt.

It seems to be a well established principle, that receivers appointed by the courts of one State have no *locus standi* in the courts of another State, save as a matter of comity. Such comity will not be extended to the prejudice of the citizens of that State whose comity is invited, or when to do so would contravene its laws or public policy. And while such comity is not universal amongst the several States of the Union, the tendency is toward according receivers appointed in one State all the rights which would be accorded them in the State of their appointment, subject to the due protection of the rights of citizens of the foreign State. *Booth* v. *Clark*, 17 How. 322; *Folger* v. *Columbia Ins. Co.*, 99 Mass. 267 (96 Am. Dec. 747); *Sobernheimer* v. *Wheeler* (N. J.), 18 Atl. 234; note to *Alley* v. *Caspari*, 6 Am. St. Rep. at p. 185; *Straughan* v. *Hallwood*, 30 W. Va. 274 (8 Am. St. Rep. 49 and full note); note to *Humphreys* v. *Hopkins* (Cal.), 15 Am. St. Rep. at p. 81; *Holbrook* v. *Ford*, 153 Ill. 633 (46 Am. St. Rep. 917); *Catlin* v. *Wilcox etc. Co.* (Ind.), 24 N. E. 250; 6 Thompson on Corp. 7334; High on Receivers, 239 *et seq.*

A statutory receiver (certainly of a corporation) occupies a position very different from that of the court receiver. If the statutes of the State under whose laws a corporation is organized, provide that a particular official, whether called receiver, statutory assignee or by other designation, shall take charge of its affairs upon insolvency or dissolution, such provision is, in effect, a part of the corporate charter. As said by the Supreme Court of the United States in *Relf* v. *Rundle*,

103 U. S. 222, a corporation may have one set of officers for managing its affairs while engaged in active operations, and another officer to take charge of and wind up its affairs upon its insolvency. When such a corporation does business in a foreign State, it not only carries with it those provisions of its charter which regulate its active operations, and of which all persons dealing with it must take notice, but those also which provide for its dissolution. The property and effects of such a corporation, therefore, vest in the official so designated by charter, or by statute, to wind up its affairs, and he has the same powers in a foreign State as in the State of his appointment. See *Bockover* v. *Life Association*, 77 Va. 85; *Parsons* v. *Charter Oak etc. Co.*, 31 Fed. 305; *Fry* v. *Charter Oak etc. Co.*, 31 Fed. 127; High on Rec., 244; 6 Thompson on Corp., 7347 *et seq.* Compare *Canada etc. R. Co.* v. *Gebhard*, 109 U. S. 527.

It would seem that this distinction between the court, or common law, receiver, and the statutory receiver, would apply only to corporations. Since it is based on the idea that the corporation carries with it, wherever it may do business, the provisions of law ordained by the State of its creation, for the regulation of its affairs, and for the distribution of its assets upon insolvency or dissolution—such laws being regarded as a part of its charter by which all who deal with the corporation are bound—the reason for the distinction could not exist in cases of statutory receiverships, or assignments, of individual or non-corporate assets. Individuals do not carry with them into foreign States the laws of their domicile, with respect to the distribution of their assets upon insolvency, as do corporations. The insolvent laws of the domicile will generally be recognized, by comity, in another State where an insolvent individual has property, but never to the prejudice of the rights of domestic creditors. So that, in such case, the statutory assignee in insolvency occupies, in a foreign State, much the same position as a court receiver. See *Matter of Accounting of Waite*, 99 N. Y. 448; note to *Winslow* v. *Fletcher*, 55 Am. Rep. 130.

LIFE INSURANCE — INTEREST — CREDITOR—ASSIGNEE.—A recent important ruling of the Virginia Court of Appeals on this subject was made in *Long* v. *Meriden Brittania Co.*, reported in full in 3 Va. Law Reg. 287. The point decided is important enough for a retrospective comment in order that it may not escape the attention of the bar.

It has long been a question in the courts whether the interest which the beneficiary of a life policy is required to have in the life insured, must continue to exist until the maturity of the policy by death, or otherwise. Or, to state the question in another way, where a policy is issued to one person on the life of another, conceded to be valid as based upon sufficient interest, what is the effect of a determination of the interest before the maturity of the policy? Or, to take a still more concrete example: Where a creditor takes out a policy on the life of his debtor to the extent of the debt, what effect upon the policy has the subsequent payment of the debt? And, again, as collateral security for a debt of equal amount, a debtor assigns a policy upon his life, to his creditor, what is the effect of the creditor's subsequently releasing the debtor from personal liability, but with a retention of his rights under the policy?

In the case mentioned above, a debtor had assigned policies for $15,000 upon his life, to a creditor to secure an equal amount of indebtedness. The debtor

afterwards made a general deed of assignment, in which all participating creditors were required to release the debtor from further *personal* liability, in consideration of such dividends as might be derived from the assets assigned. The creditor holding the insurance policies complained that if he accepted the terms of the deed, his release would determine all further interest in the life of the insured, and hence the security of the policies would be lost to him. The question was distinctly raised, therefore, whether the termination of interest in the life of the insured, would render the policies incapable of enforcement.

The court held, in accordance with what is believed to be the better rule, that if the policy is valid, for its face value, when issued or assigned to the creditor, a subsequent failure of interest will not convert the policy into a wager policy, nor affect the right of the creditor to recover upon it. Hence a creditor holding a policy, taken out by himself, on the life of his debtor, would be entitled to recover the amount of the policy, even though the debt should be paid in the meanwhile. Any other rule would practically destroy the value of life insurance as security for debts. "If," says Mr. Richards, "a creditor after paying premiums for a long term of years was likely to lose all the benefit of his insurance, it would practically prevent the use of this important kind of security." Richards on Insurance, sec. 30. The leading case on this subject is *Dalby* v. *India & London Life Ass. Society*, 15 C. B. 365, the opinion in which was delivered by Baron Parke. In that case, an insurance company reinsured a life upon which it had issued a policy. Subsequently, by an arrangement with the insured, the original policy was surrendered and cancelled, and an annuity accepted in its stead. But the policy of reinsurance was kept up by payment of premiums, until the death of the *cestui que vie*. It was held that the termination of the interest did not affect the validity of the policy, nor the right of the insured company to recover the amount.

"The contract commonly called life assurance," says Parke, B., "when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life, the amount of the annuity being calculated in the first instance according to the probable duration of the life; and when once fixed it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of the death is always . . . . . the same on the other. This species of insurance in no way resembles a contract of indemnity. Policies of assurance against fire and against marine risks are both properly contracts of indemnity, the insurer engaging to make good, within certain limited amounts, the losses sustained by the insured in their buildings, ships and effects."

This striking difference between the interest which is required to support a contract of life insurance and that required in contracts of fire and marine insurance, grows out of the fact that the latter are contracts of indemnity, pure and simple. The loss may happen or it may not. A contract of life insurance on the other hand is not a mere contract of indemnity. In contracts of fire and marine insurance, the insurer does not contemplate that he will be called to pay anything; for a small premium he takes the chances of having to pay a large sum or nothing; and it is only in a comparatively few cases that he makes any return to the insured for the premiums received. On the other hand, in life insurance contracts, the loss in every case is certain; it is contemplated as a certainty at the very inception of the contract, and the only questions are, how long before it

will occur, and what amount, paid by the assured annually during the life, will place in the coffers of the insurer an amount sufficient to pay the loss and leave a profit besides. And, as life insurance is conducted as a money making enterprise, and not from motives of benevolence, it is clear that in the majority of cases the insured really pays in more than he receives. If, therefore, the contract is one of indemnity at all, the indemnity for which the insured contracts is not only in respect of his interest in the life, but in respect of the premiums annually paid. And though the interest in the former may cease, the interest in the latter continues. The subject is learnedly discussed by Judge May, in his work on Insurance (3d Ed.), secs. 100–117.

MORTGAGE TO SECURE FUTURE ADVANCES.—The opinion in the case of *Union Bank* v. *Milburn, etc. Co.* (So. Dak.), 73 N. W. 527, contains a learned discussion of several interesting questions arising under mortgages to secure future advances. Amongst them, whether such mortgages are valid as to third persons—the effect of advances made after notice of a subsequent lien—whether registry is notice of the subsequent lien—and whether if the first creditor has obligated himself to make the advances, he may continue them after notice of the subsequent lien. The following is an extract from the opinion of Corliss, C. J.:

"That a mortgage to secure future advances is lawful as between the parties, and also with respect to third persons who deal with the land or secure liens thereon, has become an elementary principle. 3 Pom. Eq. Jur. secs. 1197, 1198, and cases cited. See, also, the decisions subsequently cited in the opinion on this branch of the case. To the extent that advances are made under it before another lien attaches to the property, all the adjudications agree that it is a prior lien thereon. The only difficulty arises when, intermediate the execution and recording of the instrument and the making of some of the future advances, other liens are affixed to the land. In such a case, shall the mortgage be a first lien as to all advances, or only as to those made before the second incumbrance has fastened itself upon the property? When we turn to the voice of authority to settle this question, we hear not a single clear utterance, but a veritable Babel of tongues. Originally, it was the rule in England that, without reference to the question whether the mortgagee was obligated by contract to make future advances, all advances secured by the mortgage, no matter when made, or whether the mortgagee then knew of the inferior lien, were a first lien on the property. *Gordon* v. *Graham*, 7 Vin. Abr. 52, pl. 3, 2 Eq. Cas. Abr. 598. But in *Hopkinson* v. *Rolt*, when this case was before the House of Lords (9 H. L. Cas. 514), Lord Campbell declared the rule laid down by Lord Cowper in *Gordon* v. *Graham* to be unsound, and the doctrine was there enunciated that the mortgagee who advances money under his security, with knowledge of a subsequent incumbrance, must, as to such advances, be content with a lien inferior to that of the holder of such later incumbrance. In this country there has been some leaning towards the early English rule. See *Witczinski* v. *Everman*, 51 Miss. 841; 1 Jones, Mortg. sec. 373; 3 Pom. Eq. Jur. sec. 1199; *Rowan* v. *Manufacturing Co.*, 29 Conn. 282; *Brinkmeyer* v. *Helbling*, 57 Ind. 435; *Brinkmeyer* v. *Browneller*, 55 Ind. 487; *Wilson* v. *Russell*, 13 Md. 495. But the stronger array of authority is found on the side of the doctrine established by the House of Lords in the *Hopkinson Case*. See *Frye* v. *Bank*, 11 Ill. 381; 1 Jones, Mortg. secs. 368, 369; 3 Pom. Eq. Jur.

sec. 1199, and cases in note 1, p. 180. This doctrine is recognized by many of the decisions to be hereafter cited. All the adjudications appear to agree that, in the absence of notice of the inferior lien, the holder of the security for future advances may continue to treat tne property as free from subsequent incumbrance, and therefore can safely make further loans to the debtor. His prior equity under the mortgage is superior to the subsequent equity of the one who holds the latter lien as to all advances made in ignorance of such subsequent incumbrance, whether made before or after it attaches to the property. *Truscott* v. *King*, 6 Barb. 346; *Shirras* v. *Caig*, 7 Cranch, 34; *Ackerman* v. *Hunsicker*, 85 N. Y. 43; *Reynolds* v. *Webster* (Sup.), 24 N. Y. Supp. 1133; *Planing-Mill Co.* v. *Schuda* (Wis.), 39 N. W. 558; *Tapia* v. *Demartini* (Cal.), 19 Pac. 641; *Ward* v. *Cooke*, 17 N. J. Eq. 93; 1 Jones, Mortg. sec. 368; *Central Trust Co.* v. *Continental Iron Works*, 51 N. J. Eq. 605, 28 Atl. 595; 3 Pom. Eq. Jur. sec. 1198; *Lanahan* v. *Lawton* (N. J. Ch.) 23 Atl. 476. Some cases go further, and hold, as we have already shown, that even notice of the inferior lien will not suffice to debar the mortgagee of a right to priority as to advances made subsequent to such notice. On the other hand, there are decisions which hold that the recording of the instrument creating the latter lien, or the docketing of a subsequent judgment, constitutes constructive notice to the prior mortgagee, so that all advances thereafter made by him are deemed to have been made with knowledge of the existence of the inferior lien, and that, therefore, they become liens as against such inferior lien only from the time such advances are made. *Ladue* v. *Railroad Co.*, 13 Mich. 380; *Saving Inst.* v. *Thomas*, 29 Gratt. 483; *Bank of Montgomery Co.'s Appeal*, 36 Pa. St. 170; *Ter-Hoven* v. *Kerns*, 2 Pa. St. 96; *Spader* v. *Lawler*, 17 Ohio, 371; *Boswell* v. *Goodwin*, 31 Conn. 74. See, also, note to *Boswell* v. *Goodwin*, 3 Am. Law Reg. (N. S.) 92; 1 Washb. Real Prop. 542. While there is much force in the arguments adduced in support of this doctrine, we regard the opposite rule as more consistent with principle, and more just in character, and better calculated to subserve business convenience; and at the present time it is certainly upheld by a greater number of decisions. Moreover, all text writers appear to favor it; and some of them go further (as, indeed, some of the courts do), and insist that actual notice of the subsequent incumbrance ought not to affect the priority of lien of the first mortgage, even as to advances thereafter made. We cite some of the cases which enunciate the rule that the holder of the inferior lien must bring home knowledge thereof to the owner of the first mortgage if he would defeat his right to claim priority as to advances made after the later lien has attached, and that the recording of the subsequent lien will not constitute constructive notice. *Ackerman* v. *Hunsicker*, 85 N. Y. 43; *Truscott* v. *King*, 6 Barb. 346; *McDaniels* v. *Colvin*, 16 Vt. 300; *Reynolds* v. *Webster* (Sup.), 24 N. Y. Supp. 1133; *Central Trust Co.* v. *Continental Iron Works*, 51 N. J. Eq. 605, 28 Atl. 595; *Ward* v. *Cooke*, 17 N. J. Eq. 93; *Tapia* v. *Demartini* (Cal.) 19 Pac. 641; 3 Pom. Eq. Jur. sec. 1199; 1 Jones, Mortg. sec. 372; *Nelson's Heirs* v. *Boyce*, 7 J. J. Marsh. 401. See 11 Am. Law Reg. (N. S.) 273. Of course, the holder of a second lien must have notice of the prior mortgage. The registration thereof constitutes such notice. But it is not enough that there is another mortgage on record when his second lien attaches. It is necessary that that instrument should inform him on its face that it is given to secure future advances, or it must state an amount for which it is security, and the sum as to which priority is claimed must not exceed this

amount. If, with a mortage on record, which on its face asserts that it is intended to secure contemplated advances, another person obtains a lien on the property, he should see to it how much in fact has been loaned at that time; and, if he desires to prevent the increase of the prior lien, he must notify the holder thereof that another lien has attached to the property. If the mortgage is for a specified sum, the one who obtains a subsequent lien is informed by the record that there may be this sum due on the prior lien, and, if no greater amount is allowed by the law to become a prior lien, he has not been prejudiced in the least. In the case at bar, the mortgage, while not stating that it was for future advances, appeared to be a first lien for $20,000, ahead of defendant's attachment. Defendant would actually be in better shape than it had any right to hope to be in view of what appeared to be due on the mortgage, if we should hold that the plaintiff's lien was prior as to all debts of Morrison to plaintiff, whether contracted before or after the second lien attached. The mortgage informed defendant that there was $20,000 due thereon, while the utmost that plaintiff claims upon its mortgage is, about $12,000. Our decision is that the mortgage is, so far this point is concerned, a superior lien as to the whole amount due thereon, unless the plaintiff had actual notice of the execution of defendant's lien by attachment before the loans of $1,000 on November 16, 1890, and $1,600 on January 5, 1891, and before certain other still later advances, which it is not necessary here to mention in detail, were made. . . . .

"The case before us is not a case where the mortgagee who holds the security for future advances has obligated himself to make such advances. It does not appear from the record that the bank bound itself to advance Morrison a dollar in the future. If it had so agreed, and the moneys subsequently loaned him had been loaned in pursuance of such agreement, it is possible that we might reach a different conclusion on the question of priority here discussed, for the stronger array of authorities is found on the side of the doctrine that under such circumstance the mortgagee's rights, even as to subsequent advances, made with full notice of the second lien, are superior to those of the holder of such lien. *Rowan* v. *Manufacturing Co.*, 29 Conn. 282, 325; *Boswell* v. *Goodwin*, 31 Conn. 74; *Brinkmeyer* v. *Helbling*, 57 Ind. 435; *Brinkmeyer* v. *Browneller*, 55 Ind. 487; 1 Jones, Mortg. sec. 370, and cases cited; 15 Am. & Eng. Enc. Law, 799."

See the Virginia case of *Alexandria Sav. Inst.* v. *Thomas*, 29 Gratt. 485; note 20 Am. Dec. 658–663; *Didier* v. *Patterson*, 93 Va. 534.

THE failure of the legislative journal to show that a bill was read on three days, as required by the Constitution, is held, in *Cohn* v. *Kingsley* (Idaho), 38 L. R. A. 74, to be fatal, as the journals must affirmatively show that the Constitution was complied with. See 3 Va. Law Reg. 682.

THE ejection of a person who has paid fare, without returning it, because of a refusal to pay fare for a child, is held, in *Lake Shore & M. S. R. Co.* v. *Orndorff* (Ohio), 38 L. R. A. 140, to render the carrier liable; but before ejecting such person and child the conductor should offer to return the unused value of the ticket or fare over and above the fares for both passengers. The other authorities as to ejection of custodian for nonpayment of child's fare are reviewed in a note to this case.

PARENT AND CHILD — REVIVABILITY OF ACTIONS. — In *Frazier* v. *Georgia Railroad etc. Co.* (Ga.), 28 S. E. 684, it is held that where a child, of sufficient age to render service, is killed by the wrongful act of the defendant, the father may recover damages, measured by the value of his services from the date of his death until majority, and that such claim is not based upon an injury to the person, but upon a property right; and, hence that the period of limitation is that applicable to actions for injury to property.

The subjoined extract presents the grounds upon which the decision is based:

"The only question which we find it necessary to decide here is that of the statute of limitations. This involves the inquiry only whether the action instituted by the plaintiff is for injuries done to the person, and to be brought within two years after the right of action accrues, under section 3900 of the Civil Code, or whether it should be treated as an action for injuries to personalty, as claimed by the plaintiff, and therefore not barred until four years after the right of action accrues. The petition is filed by the father, alleging the wrongful homicide of his son, aged 14 years, by the servants and agents of the defendant engaged in the running and operation of its trains. It may be well to consider in the determination of this question the basis of the father's right to recover when he shall have made out a proper case.

"Section 3816 of the Civil Code provides that every person may recover for torts committed to himself, or his wife, or his child, or his ward, or his servant. This section is simply declaratory of the common law. *Bell* v. *Railroad Co.*, 73 Ga. 520. At common law the parent's right to recover is, by legal fiction, predicated upon the relation of master and servant. Wood. Mast. & S. p. 449, and authorities cited under note 3; Cooley, Torts (2d Ed.) p. 268; 1 Jagg. Torts, pp. 451, 461, and authorities cited in note 23. The action is, at common law, limited to the recovery of damages for loss of the child's services. Cooley, Torts p. 268, and authorities cited in note 4; 5 East, 45; 6 East, 391; 11 East, 23; T. Raym. 259; 1 Jagg. Torts, p. 451; Wood, Mast. & S. pp. 444, 445, quoting from Lord Coke, and citing authorities, at footnote 1. The decisions of our court are in entire harmony with the principles of the common law on this subject. *Bell* v. *Railroad Co.*, *supra*, 73 Ga. 520; *Railroad Co.* v. *Harrison*, Id. 744; *Shields* v. *Yonge*, 15 Ga. 356. *Allen* v. *Railroad Co.*, 54 Ga. 503; *Chick* v. *Railroad Co.*, 57 Ga. 357; *McDowell* v. *Railroad Co.*, 60 Ga. 320. *Shields* v. *Yonge*, *supra*, 15 Ga. 349, 356, is one of the earliest of our cases, and this court there held that a father may sue for injuries to his minor son as for injuries to his servant, if the son is old enough to render service. The case of *Allen* v. *Railroad Co.*, 54 Ga. 503, recognized the same right of action in the parent, but ruled, however, that, if the child was incapable of rendering any service at the time the tort was committed, no recovery could be had. In the case of *Chick* v. *Railroad Co.*, 57 Ga. 357, the same doctrine was enunciated, and in the case of *McDowell* v. *Railroad Co.*, 60 Ga. 320, this court ruled that, while a father could not recover for the homicide of his minor daughter, he could recover for the loss of her service to the time of her majority, occasioned by such homicide. So that we can safely say that in a proper case-made the father of a minor son capable of rendering service may recover damages for the loss of service which he has sustained in consequence of the negligent homicide of the son.

"The form of the action to be brought under the common law was trespass

vi et armis, per quod servitium amisit; that is, that the defendant has by force committed a trespass upon the person of the child, whereby the plaintiff has sustained the loss of his service. While, to recover, it is necessary to show both the negligent homicide and the loss of service, it is the loss of service which is the source of damage to the plaintiff. 2 Bl. Comm. bk. 3, top p. 142, par. 4, says: 'In this case [referring to a tort committed on the servant], besides the remedy of an action of battery or imprisonment which the servant himself as an individual may have against the aggressor, the master also, as a recompense for his immediate loss, may maintain an action of trespass *vi et armis*, in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit*, and then the jury will make him a proportionable pecuniary satisfaction'—in line with which, in *Robert Marys' Case*, 9 Coke, 113a, Lord Coke lays down the rule to be: 'If my servant is beat, the master shall not have an action for this battery, unless the battery is so great that by reason thereof he loses the service of his servant, but the servant himself, for every small battery, shall have an action; and the reason of the difference is that the master hath not any damage by the personal beating of his servant, but by reason of a *per quod*, viz. *per quod servitium amisit*, ... for, be the battery greater or less, if the master does not lose the service of his servant, he shall not have an action.' In the same case Lord Coke says: 'So that the original act is not the cause of his action, but the consequence upon it, viz., the loss of service is the cause of his action.' The gist of the action is the loss of service. Wood, Mast. & S. p. 449, and authorities cited in notes 2, 3. The same doctrine is announced in Bigelow, Torts, 108, 109; 1 Minor, Inst. 224 and authorities cited. The wrong consists in actual damage by reason of loss of service or capacity to serve. 1 Jagg. Torts, 450; *Knight* v. *Wilcox*, 14 N. Y. 413. In the case of *Allen* v. *Railroad Co.*, 54 Ga. 503, it was held that no recovery could be had by the father, because, while there was a homicide, there was no loss of service. The foundation of the plaintiff's action in a case like this is to recover damages for the loss of the service of the son, and not for the homicide. *Fluker* v. *Banking Co.*, 81 Ga. 461, 8 S. E. 529. In the case of an actual parent, the loss of his service is the legal foundation of the action. 11 East, 23. By the common law, to entitle the parent to recover damages for a tort done to his child, the gist of the action is the loss of the services of the child by the parent. *Allen* v. *Railroad Co.*, 54 Ga. 505. In pleading, 'gist' means the essential ground or object of the action in point of law, without which there would be no cause of action. 1 Bouv. Law Dict. p. 712. The gist of action is the cause for which an action will lie, the ground or foundation of a suit, without which it would not be maintainable; the essential ground or object of a suit, and without which there is not a cause of action. And. Law Dict. p. 488; *Bank* v. *Burkett*, 101 Ill. 394; *In re Murphy*, 109 Ill. 33. We have cited the above authorities for the purpose of demonstrating the proposition that in all cases brought by a father to recover damages for a tort committed on his son, who was capable of rendering service, the gist of the action is the loss of the service to the father. The right of the servant for the battery, and the right of the master to recover for loss of service, are separate and distinct rights, and cannot be joined. Cooley, Torts, top p. 269; *Rogers* v. *Smith*, 17 Ind. 323. Notwithstanding an action has been brought in behalf of a child to recover damages for injuries sustained by reason of a tort committed on the person of the child, the father may recover for

himself for loss of service. Wood, Mast. & S. sec. 227; 2 Thomp. Neg. 1260; *Evansich* v. *Railway Co.*, 57 Tex. 123; *Wilton* v. *Railroad Co.*, 125 Mass. 130; *Railroad Co.* v. *Miller*, 49 Tex. 322. In the case of *Fried* v. *Railroad Co.*, 25 How. Prac. 285, in a review of rights of action under the statute which do or do not survive and go to the executor or administrator, Mr. Jutice Masten says: 'If, upon legal rules, injury to the person is the gist of the action, an injury to property or to pecuniary interests is merely matter of aggravation, the right of action dies with the person. But if, upon legal principles and analogies, the gist of the action can be injury to the property or to pecuniary rights or interests, the right of action is transmitted to the personal representative, who may recover to the extent that the wrong touched the estate of the deceased.'

"If the authorities heretofore cited are applicable to a case of this character, they establish the proposition that in a suit for the negligent homicide of a minor son who is capable of rendering service, brought by the father in his own behalf, the basis of the action is the damage to the father; that the damage to the father consists alone in the loss of service; and that, to recover in such action, it is necessary to show both the homicide or injury and the loss of service, because the latter, so far as the father's rights are concerned, grows out of, and is a consequence of, the homicide or injury. If the loss of service is the damage to the father, then it is the gravamen or gist of the action, and the right of the father to the service which he has lost is to be determined by the laws applicable in the relation of master and servant. A master has a property right in the services of his servant, otherwise he would not be entitled to recover damages for an invasion of such right. It has been held that an action by a husband to recover damages sustained in consequence of injuries inflicted upon his wife by the defendant's negligence, where such damages consist in the loss of the service of his wife, and of moneys expended for necessary medical aid and attendance upon her during her illness, etc., is an action to recover damages for an injury to property, and not for a personal injury. *Groth* v. *Washburn*, 34 Hun. 510; *Cregan* v. *Railroad Co.*, 19 Hun. 341; Id., 83 N. Y. 595; Id., 75 N. Y. 192; *Maxon* v. *Railroad Co.*, 48 Hun. 172. The ruling in the last case cited (48 Hun. 172) was reversed in 112 N. Y. 559, 20 N. E. 544, the reversal, however, being placed largely on the New York statutes, and interpretations thereof justified by reference to various sections of the New York Code. These authorities go to show that the nature of the right of the father is a property interest. If it is a property interest, it inures to him and his estate in the same manner as any other interest in property recognized by law, and existing in any other way. In the action brought in the present case the father connot be compensated for the personal suffering of the child, or for any loss occasioned to him by diminution to his capacity in any respect, or any disability created by the effect of the injury sustained upon his health, which would necessarily enter into the composition of an award of damages for the personal injury. *Groth* v. *Washburn*, 34 Hun, 510. The plaintiff has a right to the services of his child. They were of pecuniary value to him, and any wrong by which he was deprived of those services was a wrong done to his property rights. *Cregan* v. *Railroad Co.*, 75 N. Y. 195. In such an action the homicide is stated as an element only of the plaintiff's case, and by which damages resulted from the loss of the plaintiff of the child's services. Where an injury is done to the person of the plaintiff, the pecuniary damage sustained thereby cannot be so separated as to con-

stitute an independent cause of action, for the cause of action is single, and consists of injury to the person, and the damages are the consequences merely of that injury. *Id.* As has been shown, the parent or master has no right of action for the battery or homicide of the child or servant. No right of his is invaded or infringed, unless by the infliction of the injury he sustains the loss of service of the child or servant to which he is entitled. It would be an anomaly to hold that a master has no right of action for personal injuries to his servant, but that, nevertheless, the action for loss of service which is afforded him is an action for injury done to the person. The right of the master to the service of his servant is an incorporeal hereditament."

The overwhelming weight of authority is against the decision in this case, that at common law, without the aid of a statute, the father may recover for loss of service caused by the wrongful death of his child. The rule of the common law was, and is, save in so far as statutes have modified it, that no action can be brought for the death of a human being—whether it be the husband or father suing for loss of service of his wife or child, a master suing for damages for the loss of his servant, or a personal representative suing in the right of the decedent. *Carey* v. *Berkshire Railroad Co.*, 1 Cush. 475 (48 Am. Dec. 616 and note p. 633 collecting the authorities); Cooley on Torts, 14, 262; 2 Thomp. Neg. 1272; Bishop, Non-Contract Law, 1268.

The court seems to confine the right of recovery on behalf of the father, to the case where the infant is old enough to render service. We can see no reason for such restricted application of the principle. One may recover for the loss of a colt, as well as of a horse—though the former is incapable of rendering present service. Why may not the father likewise recover for loss of future services of a child? See Bishop, Non-Contract Law, 558; Cooley on Torts, 228, note; note 48 Am. Dec. 623.

That the right of the master to the service of his servant is an *incorporeal hereditament*, as held by the court, is a proposition of some novelty.

The subject of revivability of actions of tort is discussed in 3 Va. Law Reg. 439, 442.

JURISDICTION of a suit by a deserted wife to subject the property of the husband within the territorial jurisdiction of the court to her rights is held, in *Murray* v. *Murray* (Cal.), 37 L. R. A. 626, to be acquired by publication of process and placing of the property in the hands of a receiver.

THE degree of knowledge, skill, and care required of a physician or surgeon is held, in *Whitesell* v. *Hill* (Iowa), 37 L. R. A. 830, to be that ordinarily possessed by those practising in similar localities, and not necessarily limited to that which is in fact exercised in his particular locality. A note to this case reviews the other decisions on that question.

MALICIOUSLY entering judgment upon a judgment note against a solvent maker at ten o'clock at night, with the immediate issue of execution thereon, under which his store is broken into and his goods levied upon for the purpose of injuring and destroying his business credit and reputation, is held, in *Doctor* v. *Riedel* (Wis.), 37 L. R. A. 580, insufficient to make the creditor liable for malicious prosecution or abuse of process.

PREVALENCY OF PERJURY.—Edward G. Whittaker, President of the New York State Bar Association, in closing an interesting address recently made before that Association, thus speaks of the alarming prevalency of the crime of perjury, even amongst the intelligent classes. His plea for the powerful influence of bench and bar in checking a crime which strikes at the very root of all justice, as administered by human tribunals, will find a hearty response in the bosom of every honest lawyer:

"In closing, I desire to say a few words upon what I consider the greatest existing evil in the administration of justice—the prevalency of the crime of perjury in legal proceedings—and to make one or two suggestions towards a partial remedy. The profession, I believe, generally concedes that perjury is at the present time the most prevalent and dangerous crime—and the most seldom punished. It has come to such a pass that men, standing high in the community, apparently think nothing of swearing falsely to pleadings, in order to delay and defeat justice. Most of this false swearing to pleadings is made safe and possible by the use of that great perjury-begetting provision of our Code which allows allegations upon information and belief, and denials upon want of information or belief. But, in addition to swearing falsely to affidavits and pleadings, many men have no regard at all for the sanctity of an oath administered in a court of justice. To such men the actual defeat of justice, if it be to their pecuniary benefit, is viewed with complacency, even though affected by perjury.

"I think it is the observation of judges and of practising lawyers that the crime of perjury is committed in some form or other in at least five out of every ten litigated cases. After talking to many lawyers and judges upon the subject, this is the lowest estimate I have received. When we consider the thousands of litigated causes that are tried in our State each year, it is simply apalling. It is an awful, but, I believe, a true, confession. It is a shame on the administration of justice and a disgrace to our nineteen centuries of Christian civilization. Were David now alive, he might again exclaim: 'All men are liars.'

"The cause of the increase and prevalency of perjury is not hard to find. It arises largely from a weakening in the belief of future punishment, and an apparent certainty of freedom from present punishment.

"The chief test of the obligation of an oath is based upon a belief in future punishment, as is evidenced by the form of the oath, and manner of its administration, as recognized by law. If, therefore, we eliminate all idea of future punishment for perjury, and inflict no present punishment, or, in other words, abolish all punishment, both here and hereafter, it is not to be wondered at that the crime will prevail, and that men will not hesitate to commit it to further their interests. For punishment is the great deterrent to crime. From the year 1830 to 1896 there have only been on an average three convictions a year for perjury. And during the last two years only one conviction. The crime is increasing, and the punishment decreasing. Unless the commission of the crime of perjury be checked, the enforcement of rights, or prevention of wrongs, through the administration of justice will become a farce.

"Can the commission of perjury be checked, and how? Most emphatically, yes, by the bench and bar; by the judges directing investigation to be made by the district attorney in all cases tried before them when they have reason to believe perjury has been committed and can be proved. And by members of the bar

simply being honest and true to their profession. If the lawyers of this State would positively discourage false swearing on the part of their own clients, and honestly endeavor to have it punished when committed by the clients of their adversary, the crime would grow suddenly less. It is the professional duty of every lawyer to do this. He owes it to himself; he owes it to his fellow man; he owes it to his country, and he owes it to his God.

"In populous countries there should be a department in the office of every district attorney devoted entirely to the prosecution of the crime of perjury, where lawyers, who desire to do their duty, could take such cases."

How the crime of perjury is punished in Virginia may be gathered from the following press dispatch under date of February 18, 1898:

"NEWPORT NEWS, VA.—One of the most sensational trials in the history of Virginia jurisprudence was brought to a close in Hampton to-night, when the jury in the case of the State against G. W. Ashby, indicted for perjury, brought in a verdict of guilty, giving the accused one minute in jail and assessing a fine of five dollars against him.

"This case grew out of a suit for divorce, involving a prominent family.

"In 1894 Mrs. Bridgeforth sued her husband, W. H. Bridgeforth, for divorce, alleging infidelity. Upon the testimony of Ashby the divorce was granted together with alimony. To-night's verdict was a victory for Bridgeforth."

One finds it difficult to determine which is the greater outrage upon justice and decency—the offense or the verdict.

IMPLICIT reliance upon representations of a seller is held, in *Fargo Gas Light & C. Co.* v. *Fargo Gas & E. Co.* (N. D.), 37 L. R. A. 593, to be proper, and the fact that their falsity could have been discovered by investigation will not relieve the seller from liability for making false representations with intent to deceive. With this case is a note collecting the great number of cases on the right to rely upon representations made to effect a contract. See 2 Va. Law Reg. 694.